IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 738.

ALBERT JONES, APPELLANT,

vs.

H. W. PERKINS, DEPUTY UNITED STATES MARSHAL, AND M. G. WHITTLE, JAILOR OF RICHMOND COUNTY, GEORGIA, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

BRIEF OF APPELLANT.

J. GORDON JONES,
Counsel for Appellant.
THOMAS E. WATSON,
Of Counsel.

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BRIEF AND ARGUMENT FOR APPELLANT.

Statement of the Case.

Albert Jones, appellant, was arrested under and by virtue of a warrant issued by C. J. Skinner, United States Commissioner, at Augusta, Georgia, charging failure to register

law

for military duty, violation of section (5) of the act of May 18, 1917, known as the "Selective Draft Act," August 4, 1917, by H. W. Perkins, Deputy United States Marshal for the Southern District of Georgia, Northeastern Division (Record, page 3). Appellant was committed to the common jail of Richmond County, Georgia, in default of bond in the sum of $1,000 (Record, page 4). Appellant presented on August 10, 1917, his petition before Hon. Emory Speer, Judge of the District Court of the United States for the Southern District of Georgia, praying for the issuance of writ of *habeas corpus*, alleging:

(*a*) That he was being illegally held and restrained of his liberty by being confined in the common jail of Richmond County, Georgia.

(*b*) That the persons restraining him of his liberty are H. W. Perkins, Deputy United States Marshal, and M. G. Whittle, Jailor of Richmond County, Georgia. That the cause or pretense of his restraint being charges set forth in the warrant issued against him charging violation of section (5) of the "Conscript Act" of May 18, 1917, for failing to register for military duty as required by said act.

(*c*) That said act is unconstitutional and that the authority exercised by virtue of it is illegal and void, because the said act contravenes the 13th Amendment to the Constitution of the United States adopted in 1865, which amendment declares "Neither slavery nor involuntary servitude except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place, subject to their jurisdiction."

(*d*) That he has not been accused of any crime by virtue of said act, but that he is held for military duty and service, which service he is unwilling to perform and undergo, and which service is, therefore, compulsory, and that he is restrained of his liberty against his will by virtue of said act.

(*e*) That he is a free citizen of the United States, and of the State of Georgia, and that he has not forfeited his

freedom as a citizen of the United States, or of the State of Georgia, in any way known to the laws of the United States, or of the State of Georgia, prior to the act of Congress, or since the said act of Congress, to wit: "The act to authorize the President to increase temporarily the Military Establishment of the United States," approved May 18, 1917, was passed, and is therefore being held in involuntary servitude under said act of Congress, and not for any reason other than that whatever.

(*f*) That it is his right, under the common law, to remain within the realm of the United States as a free citizen.

(*g*) That he is now being detained illegally in the manner and form set forth for the purpose of being *sent beyond the seas outside of the United States, or any territory thereof, to do military duty in Europe.*

(*h*) That such forcible expulsion or banishment of him (appellant) from his native land, without his consent and against his will, violates his natural rights as a citizen of the United States, and he is entitled to the protection of his rights under the statutory law, the Constitution of the United States, and the common law.

(*i*) That he is being deprived of his liberty "without due process of law" and that he is being forced to give up all of his rights as an American free-born citizen to do military service without his consent.

(*j*) That he is restrained, illegally and without regard to his legal and constitutional rights, etc. (Record, pages 1 and 2.)

(*k*) On August 10, 1917, Hon. Emory Speer, Judge of United States Court, Southern District of Georgia, granted Order Nisi directing and commanding the persons holding appellant in custody to show cause on the 18th day of August, 1917, why a writ of *habeas corpus* should not issue. (Record, page 6.)

(*l*) On August 16, 1917, H. W. Perkins, Deputy United States Marshal, and M. G. Whittle, Jailor of Richmond

County, Georgia (appellees), by Hon. E. M. Donaldson, United States Attorney for the Southern District of Georgia, filed their answer to the petition of appellant in which denial is made of the first paragraph "that your petitioner is being illegally held and restrained of his liberty by being confined in the common jail of Richmond County, Georgia," of appellant's petition and admitting all other allegations contained in appellant's petition except that he is being illegally restrained of his liberty, which is denied by respondents, and asserting that the act of Congress referred to is constitutional and valid, and not in contravention of the Thirteenth (13th) Amendment of the Constitution of the United States or any part of the Constitution, and pray that the writ of *habeas corpus* be denied. (Record, pages 6 and 7.)

(*m*) That on August 20, 1917, Hon. Emory Speer, Judge of the United States Court for the Southern District of Georgia, rendered judgment in said cause denying the issuance of the writ of *habeas corpus*. (Record, pages 8, 9, 10 and 11.)

(*n*) On September 17, 1917, petition for an appeal was allowed and bond assessed in the sum of $250.00 by the trial judge. (Record, pages 12 and 13.)

(*o*) On September 19, 1917, assignment of error, bond and citation on appeal and acknowledgment of service were filed. (Record, pages 16, 17 and 18.)

Therefore, under section 238, Judicial Code, 36 Stat. at L., 1957, Comp. St., 1911, page 228 Supp., F. S. A., 231, this being a proceeding for issuance of writ of *habeas corpus*, there can be no difficulty about the right of appellant to appeal direct to this court.

Assignments of Error.

The assignments of error are set out on pages 14 and 15 of the record and are seven in number.

(First.)

That the United States District Court for the Southern District of Georgia erred in refusing and denying the writ of *habeas corpus* sought by appellant.

(Second.)

That the United States District Court for the Southern District of Georgia erred in sustaining the constitutionality of the act of Congress approved May 18, 1917, entitled an "Act to authorize the President of the United States to increase temporarily the military establishment of the United States," and in not adjudging said act of Congress void and unconstitutional because the same contravenes the Thirteenth (13th) Amendment to the Constitution of the United States, which declares "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

(Third.)

Because the United States District Court for the Southern District of Georgia erred in holding appellant's detention legal, because appellant was unwilling to perform and undergo compulsory military service under the aforesaid act of Congress of May 18, 1917.

(Fourth.)

Because the United States District Court for the Southern District of Georgia erred in holding that compulsory mili-

tary service under the aforesaid act of Congress of May 18, 1917, was not, and is not "involuntary servitude" within the intent and meaning of the Thirteenth (13th) Amendment to the Constitution of the United States.

(Fifth.)

Because the United States District Court for the Southern District of Georgia erred in holding that appellant, contrary to his common-law rights as a citizen of the United States, was and is liable to compulsory military service beyond the seas and without the realm of the United States, under the terms of the act of Congress aforesaid of May 18, 1917.

(Sixth.)

Because the United States District Court for the Southern District of Georgia erred in denying appellant's rights as a free citizen of the United States to remain at large with the full enjoyment of his personal liberty within the territorial limits of the United States, the act of Congress of May 18, 1917, to the contrary notwithstanding.

(Seventh.)

Because the United States District Court for the Southern District of Georgia erred in holding that appellant has not been deprived of his liberty "without due process of law."

Wherefore, the appellant prays that said order be reversed and that said District Court for the Southern District of Georgia, be ordered to enter a judgment reversing the decision of the lower court in said proceedings.

ASSIGNMENTS OF ERROR.

First and Third Assignments of Error.

Appellant contends that the act of May 18, 1917, known as the "Act to authorize the President to increase temporarily the military establishment of the United States"—"Selective Draft Act"—is void and unconstitutional and that his detention thereunder for compulsory military service was, and is, illegal; therefore, it was an error of the court to refuse and deny the issuance of the writ of *habeas corpus* as prayed for.

Vide authorities cited under other assignments of error herein.

Second Assignment of Error.

> "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place, subject to their jurisdiction" (Article 13, section (1), Constitution of the United States).

Mr. Justice Hughes, delivering the opinion of the court in the case of Alonzo Bailey *vs.* State of Alabama in declaring the meaning, force, and effect of the Thirteenth (13th) Amendment of the Constitution of the United States, used the following language: "The language of the Thirteenth (13th) Amendment was not new. It reproduces the historic words of the Ordinance of 1787 for the government of the northwest territory, and gave them unrestricted application within the United States, and all places subject to their jurisdiction, while the important concern was with African slavery and amendment was not limited to that. It was the Charter of Universal Civil Freedom for all persons of what-

ever race, color, or estate, under the flag. The words "universal servitude" have a larger meaning than slavery. "It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English Government, or by reducing the slaves to the condition of serfs." The plain intention was to abolish slavery of whatever name and form, and all its badges and intents; to render impossible any state of bondage; to make liberty free; by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude. While the amendment was self-executed, so far as its terms were applicable to any existing condition, Congress was authorized to secure its complete enforcement by appropriate legislation. As was said in the Civil Rights Cases: "By its own unaided force and effect it abolished slavery and established universal freedom, while legislation made necessary and proper to meet all of the various cases and circumstances to be affected by, and to prescribe proper modes of restraint primarily and direct in its character; for the amendment is not a mere prohibition of said laws establishing or upholding slavery, but an absolute declaration that slavery and involuntary servitude shall not exist in any part of the United States."

Bailey *vs.* State of Alabama, 219 U. S., 219, page 55; L. Ed., 191; Slaughterhouse Cases, 16 Wall., 69; 21 L. Ed., 406; 109 U. S., 20; 27 L. Ed., 842; 3 Sup. Ct. Rep., 18.

Mr. Justice Bradley, in construing the Thirteenth (13th) Amendment in the Civil Rights Cases, used this language: "This amendment, as well as the Fourteenth (14th), is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery and established universal freedom."

Mr. Justice Brown, in construing the Thirteenth (13th) Amendment in Plessey *vs.* Furguson, 163 U. S., 537, 542; 41 L. Ed., 256-7, used the following language: "That it does not conflict with the Thirteenth Amendment which abolishes slavery and involuntary servitude except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services. This amendment was said in the Slaughter-house Cases to have been intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude, and that the use of the word 'servitude' was intended to prohibit the use of all forms of involuntary slavery of whatever class or name."

Clyatt *vs.* United States, 197 U. S., 207; 49 L. Ed., 729, 730; 16 Wall., 36; 21 L. Ed., 394; 109 U. S., 320-23; 27 L. Ed., 835, 842, 843; 3 Sup. Ct. Rep., 18, 28-30.

Fourth Assignment of Error.

Appellant contends that the fourth assignment of error is well taken; and refers to the authorities cited "*supra*" to support the second assignment of error as applicable also to the fourth assignment of error.

Fifth, Sixth, Seventh Assignments of Error.

Appellant contends that the fifth, sixth, and seventh assignments of error are well taken.

(A) The act of Congress in question violates appellant's *natural rights.*

"The rights which are declared to be natural and inalienable, whose protection is guaranteed by the several constitutions are such rights as are personal to the individual as a citizen of a free community, civil as distinguished from political, and belonging alike to every man, woman, and child; they include the right of personal liberty, the right of personal security."

State *vs.* Williams, 68 Conn., 131; 35 A., 24, 421; 48 L. R. A., 465.

Pratt *vs.* Breckinridge, 112 Ky., 1, 27; 65 S. W., 136.

Natural rights as guaranteed by the several constitutions "are to be construed in every jurisdiction with reference to what was considered the natural rights of men under the common law which existed at the adoption of the Constitution."

Beebe *vs.* State, 6 Ind., 501; 63 Am. D., 391.

Mayo *vs.* Wilson, 1 N. H., 53.

Henley *vs.* State, 98 Tenn., 655; 41 S. W., 352, 1104; 39 L. R. A., 126.

"The natural rights of a person at common law are the rights of personal security in the legal enjoyment of life, limb, body, health, and reputation, the right of personal liberty, and the right of private property."

1 Bl. Com., 129.

Kosciolek *vs.* Portland R., etc., Co., 81 Or., 517; 160 P., 132.

Adoption of the common law of England by constitutional provision includes the adoption of these guaranties of life, liberty and property which were contained in Magna Charta and the other great Charters of English freedom.

Peo. *vs.* Priest, 206 N. Y., 274; 99 N. E., 547 (aff. 150 App. Div., 19; 133 N. Y. S., 1087).

"The mere statement of such guaranties in constitution is a prohibition by necessary implication of legislation inconsistent therewith, and renders such legislation void."

State *vs.* Phelps, 144 Wis., 1; 128 N. W., 1041; 35 L. R. A., N. S., 353.

(B) The act of Congress in question violates appellant's *civil and political rights.*

"The civil rights are those which are accorded to every member of a district, community, or nation."

Winnett *vs.* Adams, 71 Nebr., 817; 99 N. W., 681; see also Civil Rights, 1.

They include natural rights,

Winnett *vs.* Adams, 71 Nebr., 817; 99 N. W., 681.

but are to be distinguished from political rights, which are those exercisable in the administration of government.

Winnett *vs.* Adams, 71 Nebr., 817; 99 N. W., 681.

Political rights conferred by the Constitution, however, may not be infringed by the legislature.

Gemmer *vs.* State, 163 Ind., 150; 71 N. E., 478; 66 L. R. A., 82.

Kenneweg *vs.* Allegany County, 102 Md., 119; 62 A., 249.

Stein *vs.* Marks, 44 Misc., 140; 89 N. Y. S., 921; 15 N. Y. Ann. Cas., 155.

State *vs.* Phelps, 144 Wis., 1; 128 N. W., 1041; 35 L. R. A., N. S., 353.

The right of personal liberty consists in the power of locomotion, of changing situation or removing one's person to

whatsoever place one's inclination may direct without any restraint except by due process of law.

Crandall *vs.* Nevada, 6 Wall., 35; 18 L. Ed., 744, 745 (rev. 1, Nev., 294).

Arkansas *vs.* Kansas, etc., Coal Co., 95 Fed., 353 (rev. on other grounds, 183 U. S., 185; 22 S. Ct., 47; 46 L. Ed., 144).

Elkinson *vs.* Deliesseline, 8 F. Cas. No. 4336; Brunn. Coll. Cas., 431; 2 Wheel, Cr., 56.

"'The word "liberty" as used in the Constitution of the United States, and the several States, has frequently been construed, and means more than mere freedom from restraint. It means not merely the right to go where one chooses, but to do such acts as he may judge best for his interests, not inconsistent with the equal rights of others; that is, to follow such pursuits as may be best adapted to his faculties, and which will give him the highest enjoyment.

"'The liberty mentioned is deemed to embrace the rights of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purpose above mentioned,' per Harrison, J., in Young *vs.* Com., 101 Va., 853, 862, 45 S. E., 327."

"Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade

or avocation. Per Earl, J., in *In re* Jacobs, 98 N. Y., 98, 103; 50 Am. R., 636 (quot. Ives *vs.* South Buffalo R. Co., 94 N. E., 431; 34 L. R. A., N. S., 162; Ann. Cas. 191, B., 156 (Rev. 140 App. Div., 921; 125 N. Y. S., 1125; 68 Misc., 643; 124 N. Y. S., 920."

"All statutes and municipal ordinances which infringe on the liberty of the individual, as that term is used in constitutional guarantees, are unconstitutional and void."

Mobile *vs.* Orr, 181 Ala., 308; 61 S., 920; 45 L. R. A., 575 (ordinance).

Montgomery *vs.* Kelly, 142 Ala., 552; 38 S., 67; 70 L. R. A., 209.

State *vs.* Dalton, 22 R. I., 77; 46 A., 234; 84 Am. S. R., 818; 48 L. R. A., 775.

(C) Because said act of Congress creates a system of "involuntary servitude" which deprives appellant of his rights as a citizen of the United States.

By the Thirteenth Amendment of the Constitution of the United States it is provided that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The leading purpose of this amendment was to effect the abolition of African slavery in the United States.

Civil Rights Cases, 109 U. S., 3; 3 Sct., 18; 27 L. Ed., 835.

Butchers' Benev. Assoc. *vs.* Crescent City Livestock Landing, etc., Co., 16 Wall. (U. S.), 36; 21 L. Ed., 394; *Ex p.* Drayton, 153 Fed., 986; *Ex p.* Riggins, 134 Fed., 404 (rev. on other grounds, 199 U. S., 547; 26 Sct., 147; 50 L. Ed., 303).

But the addition of the words "involuntary servitude" to the prohibition of the amendment gave it a broader scope, *and it has been applied to any servitude in fact involuntary*, no matter under what form such servitude may have been disguised.

Butler *vs.* Perry, 240 U. S., 328, 332; 36 Sct., 258; 60 L. Ed., 672.

Thus it has been held to apply to slave customs prevailing among the uncivilized tribes of Alaska;

In re Sah Quah, 31 Fed., 327;

to involuntary servitude under the guise of an apprenticeship.

In re Turner, 24 F. Cas. No. 14,247; 1 Abb. (U. S.), 94, 87;

and to render void all statutes or contracts providing for a state of peonage, such as has existed in Chica, in Mexico, and portions of the United States acquired from Mexico.

Bailey *vs.* Alabama, *supra.*

And more recently under statutes of various States of the Union.

Bailey *vs.* Alabama, *supra*, 12 C. J., 934, 935, 936.

ARGUMENT.

Counsel for appellant closes this brief by adopting the able, timely, and comprehensive argument made in the trial below by Thomas E. Watson, Esq., leading counsel in this case in the court below.

> "In the great and well-known work generally called 'De Tocqueville's Democracy in America,' the learned author says:
>
> " 'The peace, the prosperity and the very existence of the Union are invested in the hands of the seven judges'—meaning the judges of the United States Supreme Court. 'Without their active co-operation, the Constitution would be a dead letter; the Executive appeals to them for assistance against the encroachments of the legislative powers; the legislature demands their protection from the designs of the Executive; they defend the Union from the disobedience of the States; the States from the exaggerated claims of the Union, the public interest against the interests of the private citizen, and the conservative spirit of order against the fleeting innovations of democracy. * * * They are all-powerful guardians of a people which respects law * * *.
>
> " 'The President, who exercises a limited power, may err without causing great mischief in the States. Congress may decide amiss, without destroying the Union, because the electoral body, in which Congress originates, may cause it to retract its decision by changing its members. But if the Supreme Court is ever composed of imprudent men, or bad citizens, the Union may be plunged into anarchy or civil war.
>
> " 'The real cause of this danger, however, does not lie in the constitution of the tribunal—the Supreme

Court—*but in the very nature of Federal governments.*'

"The important substance of the great Frenchman's statements in these paragraphs is: that Federal governments are peculiar, each being distinguishable from the other, by the nature of its written compact of organization, and all of them being different from such a government as that of Great Britain, for instance, which is not the result of any constitutional convention or sudden act of social communities desiring to set up a government, but the result, on the contrary, of the slow growth of principles and institutions.

"The political literature of England is full of allusions to what are called 'the principles of the British Constitution,' but as everybody knows, Great Britain has no constitution in the sense that the Swiss Confederation has one, or that the existing French Republic has one, or that the United States of North America have one.

"It consequently follows, that in deciding any question arising under the Constitution of the United States, arguments drawn from history and historical analogies are almost worthless, and often misleading.

"The very existence of the Supreme Court of the United States implies that the President may overstep his official powers; that Congress may usurp an authority not delegated to it by the States, and that the States themselves may either trench upon Federal authority, or be illegally invaded by it.

"The question before the court, as we most respectfully submit, reduces itself to this: Has Congress the right to assume that the Constitution is automatically suspended, when Congress declares that a state of war exists?

"In other words: Has Congress the right to de-

clare that a condition of facts, alleged by Congress to be in existence, authorizes Congress to expand its own powers, and to exercise unlimited authority, *by a majority vote, to dispose of the lives, the liberty and the property of citizens without due process of law?*

"For example: Is it within the power of Congress, by a majority vote declaring that a state of war exists, to set up a system of religion, to abolish freedom of worship, to forbid peaceable assemblage and petition, and to require that every citizen publishing a book submit the same, in advance, to official censors, who can forbid its publication, as was done in Great Britain and Europe during the time of John Milton?

"Is it possible for Congress (in the exercising of its constitutional power to raise armies) to nullify the second half of the sentence in which this power is delegated, and, instead of limiting war appropriations for two years, as the Constitution demands, extend those appropriations for thirty years?

"Can Congress emasculate the Supreme Law, by enforcing one-half of a sentence of it, and nullify the other half?

"Is it within the power of Congress, by first declaring that a state of war exists, to abolish free speech, and to enlarge the constitutional definition of treason as to embrace whatever other offences Congress may see fit to classify as treason?

"During the time of our great and most deplorable Civil War, this Supreme Judicial Tribunal was brave enough to denounce as illegal the action of the Lincoln administration in suspending the writ of *Habeas Corpus.*

"There was a Federal judge in New Orleans, in

1815, who was brave enough to arrest Andrew Jackson at the head of his victorious army.

"Against the arbitrary and despotic conduct of Gen. Jackson, the United States court asserted the civil authority vested in the judiciary and fined the conquering hero a thousand dollars, for his contempt of court, and his violation of the civil rights of a civilian.

"In Lord Rosebery's fascinating book, 'Napoleon, the Last Phase,' it is stated that the Admiral in command of the British navy, had to resort to ruses—the secret shifting of Napoleon from boat to another—to prevent the civil officers of one of the courts from making service of the writ of *habeas corpus*, the purpose being to have the great prisoner brought before English judges, in order that they might determine whether or not his sentence to life-long exile was legal, in view of the well-known fact that he had voluntarily come aboard a British man-of-war, off a French port, had surrendered himself, and had claimed for himself the protection of English law.

"The military autocrats and Tory oligarchs, who at that time ruled Great Britain, and had been for so many years waging war upon French democratic principles were absolutely afraid to allow Napoleon Bonaparte to appear before one of the higher courts of England to plead against the arbitrary measure of military depotism.

"Let us hope that this spirit of judicial independence will never become extinct.

"Let us hope that life-tenure judges will always be what our ancestors intended them to be, and that not even an Aaron Burr can be given such a bad name by those in power, that a John Marshall or Roger B. Taney will not always be found, who will interpose the protection of the law—refusing to alter

the Constitution of the Union, to please any President whomsoever, although the President be Thomas Jefferson.

"Does not the Army Increase Act of May 18, 1917, make a new departure from any legislation heretofore known in this Republic?

"Citizens of selected ages are required to register for military service, and are subjected to pains and penalties if they refuse to perform this new duty.

"Having registered, they become automatically (according to the proclamation of General Crowder) soldiers not by enlistment, not by being actually mustered in, but from the mere act of signing their names, they become soldiers of the United States, subject to be court-martialed and shot, if they fail to afterwards appear for physical examination and enrollment.

"By this automatic process, they become amenable to military orders, to serve at home and abroad.

"By this automatic process, they become liable to be assigned for duty at manual labor in mines, factories, and fields.

"The President of the United States, in one of his proclamations this year, made the statement, in almost those exact words.

"He said that those registered Americans, those conscripts—if we may be allowed to call them so—can, by the will of the President, be assigned to manual labor; in the various branches of industry if the necessities of the war, as judged by the President, require it.

"Again, under this act of May, 1917, section three, the entire civil establishments of all the States are swept away, so far as any independence of theirs is concerned.

"*Every officer of the State is conscripted and placed under military command of the President.*

"From Governor down to bailiff, the States' representatives become a portion of the National Army, and must perform, at the command of the President, such duties as he sees fit to impose upon them.

"So far as we know, Germany alone adopts and practices this system. We learn from the Memoirs of ex-Ambassador Gerard that immediately after the declaration of war in Berlin (1914) the military machine assumed control of civil officers and made the civilian official a portion of the war machine.

"Again, the act of Congress under consideration authorizes the President to do what the Constitution expressly forbids, namely, it authorizes him to merge the State Militia with the National Army.

"By another proclamation which the President issued in July, 1917, the National Guard (State Militia) was fused with the Federal Army and made subject to the same orders, regardless of the constitutional provision, which limits the national use of State troops to the repelling of invasion, the suppression of insurrection, and the enforcement of our laws.

"Is it possible to ignore the fact that this new act of Congress of May, 1917, treats the Constitution of the United States as having been made a dead letter—a scrap of paper—by the previous declaration of Congress, that 'a state of war existed'?

"Let us see whether the new acts of Congress ignore and violate the Constitution.

"We submit that they do so when they disobey the constitutional prohibition against military appropriations for more than two years.

"Second. When they ignore the constitutional limitation of the use of the State Militia by the Federal Government.

"Third. When they place it within the power of the President to not only inject the State troops into the Federal Army, but to send those State troops into foreign countries for military service, regardless of the willingness of the State troops to be used in such service.

"Fourth. When they make the Conscription Act so broad that the President can divide the conscripts as he may deem best, into soldiers, miners, mill hands, and farm workers.

"Fifth. When the entire Republican form of government of the States is temporarily abolished and the State placed under martial law, subject to the military commands of the President.

"Sixth. When the citizens are compelled, without regard to their circumstances and wishes, to enroll themselves for military duty, the purpose being to send them into foreign countries to take part in a war which the people at large have never in any way approved, and into which our citizens are unwilling to go.

"(The purpose of the Conscription Act and of the following acts of Congress, as well as the speeches, addresses, and proclamations of the President, and the loans floated upon the country by the Government, are so well known and are of such a public character that we respectfully request the court to take judicial cognizance of them.)

"There is no thought in my mind—nor has there ever been—of comparing a soldier to a slave. I have not any more thought of doing that than I have had of indulging in a stump speech on this terribly important question.

"What I do say, and most earnestly insist upon, is that Congress, in passing the act of May 18, 1917, has violated the Thirteenth Amendment as well as the

Fifth, because that amendment not only guaranteed to the recently emancipated black people—the special subject of the amendment—but guaranteed to him, as well as to all others, his perfect immunity from any source of involuntary servitude.

"In express terms the Constitution gives Congress the power to build post roads; but has any lawyer ever contended that Congress can build such roads with forced labor?

"To enroll the citizen who is at work, say, on the farm, and assign him to work in the factory, by military order, as the President says he can do under this act, would certainly be involuntary servitude, whenever the farmer is unwilling to be assigned. So with those thousands and tens of thousands whom the President said he might assign to involuntary labor in mines and in fields.

"The system of government created by our forefathers in the making of the Constitution under which we now live was necessarily complex, because the sovereign powers which were exerting themselves through the delegates at Philadelphia to create a central government were independent States, each of whom was proud and jealous of its sovereignty. The small States feared to go into a union without adequate protection from the large States, hence Delaware, Rhode Island, and Georgia wanted equality in the Federal Council with Virginia, New York, and Pennsylvania. To adjust this difference our Senate was made as it is.

"Again, there was the question of slavery, and upon that, also, as everybody knows, another compromise had to be reached.

"But there was also a question of jealousy which was common to all the States, as against the new central power which was about to be organized under the new Constitution.

"The little State might be ever so much afraid of the preponderating selfishness of the big State; the free States might be ever so much opposed to the political influence of enslaved negroes in the National Council; but there was one fear that overshadowed all others, and it was felt in New York and Virginia perhaps even more keenly than in North Carolina and in Maryland, and that fear was that the Central Government would gradually encroach upon the States, usurping first one power and then another, until those separate sovereign States would be reduced to the condition of mere subject-provinces, ruled arbitrarily by the Federal Government.

"As all students know, this question occupied more time in the debates on the adoption of the Constitution than any other discussion which it aroused.

"All those who are familiar with 'The Federalist' know how earnestly James Madison and Alexander Hamilton argued and pleaded to allay the fears of the people upon this subject.

"Again and again, in 'The Federalist,' we find these great statesmen asserting that there could never be any danger to our liberties and to what were once called States' Rights, because of the growth of a Federal military.

"These statesmen argued, contended, and quoted from the Constitution itself those clauses which forbid military appropriations for more than two years; which forbid the merging of the State troops with the Federal army; which reserved the State militia for State purposes, excepting those three cases mentioned, and which provided that the appointment of the officers of the State militia shall always remain with the Governors of the States. Mr. Hamilton especially laid great stress upon this point, the substance of his argument being *that the State would*

always have controlling influence over the State troops, because of the fact that the officers would always owe their appointment to the State.

"In No. 24 of 'The Federalist' Mr. Hamilton says that if a stranger to our politics were to read the newspapers of that day he would suppose that the power of raising and maintaining armies rested with the Executive, whereas, if he were to read the Constitution itself, he would see that the whole power of raising armies was lodged in the legislature, not in the Executive, and that the Constitution contained the important qualification restricting even the legislative discretion, 'in that clause which forbids the appropriation of money for the support of an army for any longer period than two years.'

"In 'The Journal of the Constitutional Convention,' by Mr. Madison, we find that several plans were proposed to safeguard the State and the country at large from the dangers of a standing army—militarism as it is now called—and that the Fathers finally adopted the two-year limit on the supply bills, as being the best and surest method of safeguarding our liberties against the military power which had become, in England, the nightmare and constant dread of those who believed in popular institutions and civil liberties.

"Mr. Hamilton, in No. 29 of 'The Federalist,' ridicules the idea that the liberties of the country, or the reserved rights of the States, can ever be endangered by the Federal Government through the exercise of the military power.

"First, Mr. Hamilton says that 'the scheme of disciplining the whole nation'—compulsory military service, of course—'must be abandoned as mischievous or impracticable.'

"But he goes on to urge the necessity of 'a select corps of moderate size' to be trained as the militia of

the Union; and he says that this moderate corps of Federal troops, together with the State militia, 'appears to me the only substitute that can be devised for a standing army, and the best possible security against it, if it should exist.'

"Mr. Hamilton ridicules the idea that the militia could ever be dangerous to our liberties, because 'this militia would be composed of our sons, our brothers, our neighbors, our fellow-citizens.'

"Mr. Hamilton asks: 'What shadow of danger can there be from men who are daily mingling with the rest of their countrymen, and who participate with them, in the same feelings, sentiments, habits, and interests? What reasonable cause of apprehension can be implied from a power in the Union to prescribe regulations for the militia and to command its services when necessary, while the particular States are to have *the sole and exclusive appointment of the officers?*' (These italics are Mr. Hamilton's.)

" 'If it were possible seriously to indulge a jealousy of the militia, upon any conceivable establishment under the Federal Government, the circumstance of the officers being *in the appointment of the States* ought at once to extinguish it. There can be no doubt that this circumstance will always secure to them—the State officers—a preponderating influence over the militia.'

"What becomes of all this fine theory, of liberty safeguarded forever by constitutional provisions, when Congress enacts military appropriations, covering a whole generation, welding the State militia with the Federal army, uniting to these powers the Presidential right to establish a system of forced labor in mine, mill, and field, and when the very State officers who were, under the Hamiltonian theory, to act as guardians and saviors of State rights and liberties, are them-

selves conscripted into the military service of the Federal Government?'

"Mr. Madison, in one of the finest papers in 'The Federalist' (the 39th), describes the wonderfully complex character of our great Union, which drew from Lord Chatham, in the British Parliament, that eulogy of which Americans have always been proud, and says in conclusion:

" 'The proposed Constitution therefore, even when tested by the rule laid down by its antagonists, is, in strictness, neither a national nor a Federal Constitution; but a composition of both. In its foundation it is Federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly Federal, and partly national; in the operation of these powers, it is national, not Federal; in the extent of them again, it is Federal, not national; and finally, in the authoritative mode of introducing amendments, it is neither wholly Federal nor wholly national.'

"Mr. Madison earned the noble title of 'The Father of the Constitution.' If he did not understand the Organic Law of the Union, probably no one ever did. But if our Government is what Mr. Madison described it to be, it must be obvious to the most superficial thinker, that the Supreme Court, to whom is confided the rights of the Federal Government upon the one hand, and those of the States and the citizens upon the other, needs to be a tribunal of the maturest wisdom, the purest patriotism, the most fearless and determined purpose to uphold the law.

"Mr. Hamilton, in the next to the last paper of 'The Federalist,' declares that Magna Charta, The Petition of Right, The Declaration of Rights of 1688, and the Bill of Rights, *were compacts between kings and their subjects.*

"Mr. Hamilton says that there can be no comparison between such charters, granted by kings to their subjects, and our Constitution, which is *founded upon the power of the people*, and executed by their immediate representatives and servants. He says:

" 'Here, in strictness, the people surrender nothing, and *as they retain everything, they have no need of particular reservations.*' Mr. Hamilton quotes the beginning of the preamble: 'We, the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.'

" 'This,' says Mr. Hamilton, 'is a better recognition of popular rights than volumes of aphorisms, which make the principal figure in several of our State bills of rights.'

* * * * * * *

"Can the war power be used by Congress in utter disregard of constitutional provisions, and of the various bills of rights of the States?

"Is there no law but that of the majority in Congress, when that majority sees fit to declare that a state of war exists?

"If Congress can enlarge its own powers, without limit, save that prescribed by a majority vote of that Congress, what becomes of the Constitution, and where was the common sense of ever having adopted such a supreme law for the government of this Union?

"Is it not a mere mockery for the Constitution itself to say that it shall not be changed, except by the concurrent action of three-fourths of the States, *if Congress can change it by a majority vote at any time, when it actually sees*, OR PRETENDS TO SEE, *a state of war?*"

Counsel for appellant concedes that the conscription acts of both the Union and Confederate States passed during the war of secession were sustained by the courts, north and south, in a large number of cases. It is respectfully submitted that the points made in the case at bar are quite different from those which were germane to those decisions; and that those decisions are not direct authority to the case at bar which grows out of the application and interpretation of the Thirteenth Amendment to the Constitution; said amendment not having been adopted until after the close of said war of secession.

Respectfully submitted,

J. GORDON JONES,
Counsel for Appellant.